DIVISION I

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
LARRY D. VAUGHT, JUDGE

CA05-1415

September 20, 2006

JANE MERLE KEAHEY
APPELLANT

v.

WILLIAM A. COX, et al.
APPELLEES

AN APPEAL FROM MILLER COUNTY CIRCUIT COURT
[No. E-99-467-3]

HONORABLE JOHN R. LINEBERGER, CIRCUIT JUDGE

AFFIRMED

This case has been to this court twice before. In our second opinion, issued on December 3, 2003, we recited the relevant facts and procedural history:

> William Cox, administrator of the estates of Virginia Lantrip and John Lantrip, has appealed from an order of the Miller County Circuit Court dismissing his third-party complaint against appellee Jane Merle Keahey. This case was previously before us in *Lantrip v. Keahey*, No. CA01-150 (September 26, 2001), when we dismissed the appeal for lack of a final order. The facts and proceedings leading up to our earlier decision were as follows:
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> > This is an appeal from an order granting the appellee/third-party defendant's motion to dismiss on the basis of *res judicata*, claim preclusion, and issue preclusion. Appellant/third-party plaintiff contends that the trial court erred in granting the motion to dismiss. We dismiss the appeal because the order from which it is taken does not adjudicate all of the claims or the rights and liabilities of the parties and is, therefore, not a final appealable order.

On October 4, 1999, John Allen Cross and Glenda Jo Cross (the Crosses) filed a complaint against Virginia Maxine Lantrip, individually and as the administratrix of the estate of John Lantrip, deceased. The complaint alleged that the Lantrips conveyed, by warranty deed, a one-fourth interest in certain property located in Miller County, Arkansas, to the Crosses on December 14, 199[3]. The Lantrips reserved one-fourth of the mineral rights. John Lantrip claimed to have title to the property as the only child and sole heir of his father, Earl Lantrip, who died intestate.

The Crosses' complaint further alleged that on June 26, 1998, James and Brenda Cross and David and Agnes Cross filed a complaint (No. E-99-323-3) against the Crosses, alleging that they purchased a one-eighth interest in the same property the Crosses purchased from the Lantrips. James and Brenda Cross and David and Agnes Cross claimed to have purchased their one-eighth interest from Jane Merle Keahey, who executed a warranty deed conveying the property on January 7, 1998. Keahey also claimed to be the child and heir at law of Earl Lantrip.

For relief in the present case, the Crosses sought to compel Virginia Lantrip to intervene in case No. E-99-323-3 and to be required to defend their one-fourth interest in the property at issue. Virginia Lantrip filed an answer, and later she filed a third-party complaint against Jane Merle Keahey on November 15, 1999. She alleged that Keahey was the natural born child of Mabel Lantrip, who was born prior to Mabel's marriage to Earl Lantrip and had no blood relationship to Earl. Thus, Keahey was the half-sister of John Lantrip and sister-in law of Virginia Lantrip. Lantrip alleged that any interest claimed by Keahey in the property at issue is based on the improper claim that she is the natural born child of Earl Lantrip. Based on Keahey's wrongful conveyance, Lantrip claimed to have been damaged in that she was forced to defend the lawsuit filed by the Crosses and that her reserved interest in the mineral rights had been depleted. Additionally, Lantrip claimed that Keahey tortiously interfered with her contract with the Crosses.

On April 4, 2000, Keahey filed a motion to dismiss Lantrip's third-party complaint on the grounds that it failed to state facts upon which relief could be granted, that the claim was barred by *res judicata*, and that she was incompetent and without a guardian and thus could not be sued. In support of the motion, Keahey attached as exhibits, a motion for judgment on the pleadings and brief in support from case No. P-98-243-3, styled "Virginia Lantrip, administratrix of the estate of John Lantrip, deceased, vs. Jane Merle Keahey," a reply brief, and an order of dismissal. The motion for judgment on

> the pleadings in case No. P-98-243-3 had been granted by way of an order of dismissal entered September 7, 1999. The order of dismissal stated that the pleadings did not set forth a justiciable controversy between the parties and that Lantrip had no standing to raise the issue of heirship between herself as the administratrix of the estate of John Lantrip, deceased, and Keahey. Lantrip filed a response to the motion to dismiss, denying the allegations of the motion.
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> The trial judge granted Keahey's motion, dismissing the third-party complaint with prejudice, on the grounds that the claim was barred by *res judicata*, claim preclusion, and issue preclusion. The order of dismissal was filed October 4, 2000, and Lantrip's notice of appeal was timely filed November 3, 2000.

Lantrip v. Keahey, No. CA 01-150 (September 26, 2001), slip op. at 1-3.

On September 26, 2001, we dismissed the appeal as not final because it adjudicated fewer than all of the claims of fewer than all of the parties and the trial court had not followed the requirements of Ark. R. Civ. P. 54(b). We now address the facts and proceedings leading to the present appeal.

Virginia Lantrip died on April 1, 2001. On November 7, 2001, "Mrs. Lantrip" filed a motion for entry of final judgment in keeping with Rule 54(b). In response, Ms. Keahey noted that Mrs. Lantrip had recently died, that an alternate administrator of Mr. Lantrip's estate had not been appointed, and that this action had not been revived. Appellant William Cox, the Lantrips' son-in-law, was appointed administrator of Mrs. Lantrip's estate on February 8, 2002. Plaintiffs John and Glenda Cross filed a motion to revive this action on February 13, 2002. Mr. Cox filed a motion on February 21, 2002, to revive this action on behalf of the estates of Mr. and Mrs. Lantrip. In that motion, he also requested that he be appointed special administrator of the estate of Mr. Lantrip for the purpose of litigating this case.

On June 26, 2002, the circuit court entered an order of revivor substituting Mr. Cox, as administrator of the estates of Mr. and Mrs. Lantrip, as the defendant in this action. On the same day, the court entered an "Order of Final Judgment and Dismissal," amending the original order of dismissal ....

....

Although the circuit court made specific findings to support an immediate appeal, it neglected to include a certification as required by Rule 54(b). Mr. Cox filed a notice of appeal on July 22, 2002, and the record was lodged with the supreme

> court clerk on October 18, 2002. On November 27, 2002, Mr. Cox filed a motion to stay brief time and to remand to the trial court for an order complying with Rule 54(b). We granted that motion, and the trial court entered an amended order of final judgment and dismissal that included the necessary findings and certification. The amended order was filed with this court as a supplement to the record on February 3, 2003.
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> Mr. Cox argues on appeal that the trial court erred in finding his claims to be barred by res judicata, claim preclusion, and issue preclusion.

Cox v. Keahey, 84 Ark. App. 121, 124-28, 133 S.W.3d 430, 431-34 (2003).

In our second opinion, we held that the trial court erred in finding Mr. Cox's claims barred and reversed and remanded for trial. On March 4, 2005, a report of the DNA test results on samples taken from John Lantrip (deceased) and appellant was issued. This report stated: "John H. Lantrip (deceased) and Jane M. Keahey are 84.4 times more likely to be half siblings than to be full siblings. The probability of the stated outcome, assuming a 50% prior chance, is 98.82%." Trial was held on July 26, 2005, at which the DNA test results were admitted and other documentary evidence and testimony were taken as to whether Earl Lantrip was appellant's father.

The circuit court made the following findings in its order on September 12, 2005:

> 4. It is undisputed that John Lantrip and Jane Merle Keahey have a common mother, Mable Lantrip who was married to Earl Lantrip. Plaintiffs contend that Ms. Keahey was born one year prior to John and Mable Lantrip's marriage and that her father is Clarence J. Garrison. Third party defendant contends that Ms. Keahey was born after John and Mable Lantrip were married and that the strong presumption that children born during a marriage requires the court to find John Lantrip to be her father.
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> 5. Genelex Corporation performed DNA testing on samples taken from John Lantrip and Jane Merle Keahey. Its scientific findings were:

John H. Lantrip (deceased) and Jane M. Keahey are 84.4 times more likely to be half siblings than to be full siblings. The probability of the stated outcome, assuming a 50% prior change is 98.82%.

6. Additional evidence favorable to the plaintiffs reflects:

a. The U.S. Bureau of Census report dated April 1, 1940, reflects that only one child, John, age 5, resided with Earl and Mable Lantrip.

b. Jane Keahey did not live with Earl and Mable Lantrip until she was 10 or 11 years old.

c. Jane Keahey used the name Janie Merle Harris before using the name Janie Merle Lantrip.

d. Jane Keahey received gifts from Clarence and Vera Garrison during the time she used the name Harris.

e. Earl Lantrip and Mable Harris were married March 5, 1932. Jane Keahey's daughter's birth certificate shows that Jane Keahey was 19 years old when her daughter was born in October 1950, making her birth year 1931, the year before Earl and Mable Lantrip's marriage.

f. Obituaries received in evidence listed Jane Keahey as the daughter of Clarence J. Garrison and the sister of Scott Garrison.

g. Jane lived with the Garrison's [sic] until after John Lantrip's birth, then moved in with her mother Mable and Mable's husband Earl Lantrip.

7. Evidence favorable to third party defendant reflects:

a. Earl Lantrip and Mable Harris were married on March 5, 1932. Jane Merle Lantrip's delayed certificate of birth reflects her date of birth as October 6, 1932, which was during the marriage of Earl and Mable Lantrip.

b. There was no evidence that Earl Lantrip was impotent or did not have access to Mable Lantrip when Jane Keahey was conceived.

c. Jane Keahey's delayed birth certificate was issued on the "affidavit of personal knowledge of Earl Vandorn Lantrip – father."

d. The obituary of Earl Lantrip named Jane Lantrip Keahey as a daughter.

e. The Fouke school annual showed pictures of John Lantrip and Jane Lantrip.

f. There was no substantial family history indicating that Jane Keahey was thechild of any man other than Earl Lantrip.

8. The Court was presented with conflicting evidence as to when Ms. Keahey was born – a document reflecting birth prior to the marriage of Earl and Mable Lantrip and a substitute birth certificate showing that her birth was after the marriage. Resolution of this issue is important because if she was born after the marriage there is a strong presumption that she was a child of the marriage. ACA 9-10-120. In fact, in earlier days, a common law rule prohibited declarations of husband and wife to even be admitted in evidence. *Thomas v. Pacheco*, 293 Ark. 564, 740 S.W.2d 125 (1987). That rule was relaxed by Act 657 of 1989, codified as ACA 16-43-901, but the evidence must still be clear and convincing to overcome the presumption. *Leach v. Leach*, 57 Ark. App. 155, 943 S.W.2d 286 (1997). If, on the other hand Ms. Keahey was born prior to the marriage of the Lantrips, no such presumption arises.

9. Today, DNA testing, (see ACA 16-34-901 and 9-10-108) is the mostly [sic] widely used tool to settle paternity disputes. Ninety-five percent probability is the guideline. Such a test was performed in this case with a clear and convincing conclusion (98.82%) that John Lantrip and Jane Keahey are more probably half siblings, which means that they had only one common parent. The common parent could be either Earl Lantrip or Mable Lantrip, which standing alone does not settle the controversy but it does limit the inquiry to the issue of which person is the common parent.

10. A review of the transcript reveals that John Lantrip was, without question, believed by all to be the biological child of Earl Lantrip. His Arkansas Birth Certificate reflecting Earl to be his father was received in evidence without objection. No one even insinuated that he might not be Earl's child.

11. The evidence further reveals that John Lantrip was, without question, believed by all to be the biological child of Mable Lantrip. His Arkansas Birth Certificate reflected Mable to be his mother and no one even insinuated that he might not be Mable's child.

12. The evidence further reveals that Jane Keahey was, without question believed by all to be the biological child of Mable Lantrip. Her delayed Arkansas

Birth Certificate reflected Mable to be her mother and no one insinuated that she might not be Mable's child.

13. Mable Lantrip is the consensus common parent of John Lantrip and Jane Keahey. Earl Lantrip therefore could not be the common parent. The clear and convincing evidence reflects that Earl Keahey is not the biological parent of Jane Keahey.

14. There is additional substantial evidence that Jane Keahey is not the biological child of Earl Lantrip. If she was born during Earl and Mable's marriage and was, in fact, a product of the marriage, surely someone would have had a logical explanation as to why she did not live with her parents in her parent's home until she was 10 or 11 years old. Why would she have lived for so long with non-relatives named Garrison even though the Lantrips could have provided a suitable home? Why also was there not a logical explanation as to why she used the name Harris during her early years? While her delayed birth certificate reflects that Earl Lantrip acknowledged her as his daughter, he did not do so during her minority. ACA 9-10-120(a).

The circuit court concluded that Mrs. Keahey was not a daughter and heir of Earl Lantrip and, therefore, had no interest in the 120 acres to convey. The court expressly denied the Crosses' petition for damages. Mrs. Keahey filed a timely notice of appeal from that order.

Appellant first argues that the circuit court's order did not comply with Ark. R. Civ. P. 14, which permits a defendant to file a third-party complaint against a person who is or may be liable to him for all or part of the plaintiff's claim against him, because the Crosses were granted relief only against appellant, and not against Mr. Cox. Appellant, however, first raised this point in her post-trial brief, and she failed to obtain a ruling on it. Therefore, we do not address it on appeal. *See Peoples Bank & Trust Co. of Van Buren v. Wallace*, 290 Ark. 589, 721 S.W.2d 659 (1986); *Price v. Rylwell, L.L.C. and Pulaskilands, L.L.C.*, __ Ark. App. __, __ S.W.3d __ (May 17, 2006).

In her second point, appellant challenges the trial court's finding that she is not the daughter of Earl Lantrip on two bases: (1) her assertion that she was born *during,* not *before*, the marriage of Earl and Mable Lantrip and, therefore, an unrebutted presumption arose that she is Earl's legitimate child; and (2) her contention that Earl's affidavit, given in support of her delayed birth certificate issued in 1980, amounted to an acknowledgment of paternity as contemplated by Ark. Code Ann. § 9-10-120(b) (Repl. 2002), which, by operation of law, constituted a conclusive finding of paternity.

Appellant correctly points out that, according to Ark. Code Ann. § 28-9-209(a)(2) (Repl. 2004), a child born during a marriage is presumed to be the legitimate child of both spouses for all purposes of intestate succession. In its order, the circuit court did not expressly state that appellant was born in October 1931, prior to the date of the Lantrips' March 1932 wedding, and not in October 1932, as set forth in her delayed birth certificate. Instead, the court expressed its doubt that appellant was actually born in 1932 (which would give rise to the presumption of legitimacy) but also found that there was clear and convincing evidence that she was not Earl's daughter (which was sufficient to overcome that presumption).

The most important pieces of proof to support appellant's position were the March 5, 1932, marriage license of Earl and Mable Lantrip and appellant's delayed certificate of birth, filed in June 1980, which reflected her date of birth as October 6, 1932, and which was expressly based on Earl's "Affidavit of Personal Knowledge...." The presumption of legitimacy of a child born during a marriage is one of the most powerful presumptions in

Arkansas law. *Leach v. Leach*, 57 Ark. App. 155, 942 S.W.2d 286 (1997). Arkansas Code Annotated section 16-43-901 (Repl. 1999), which abolished Lord Mansfield's Rule, a common law rule providing that the declarations of husband and wife could not be admitted to bastardize a child born after marriage, permits a mother, her husband, and a putative father to testify about the paternity of a child, and it states that the results of blood or scientific testing may be admitted into evidence on the issue. Arkansas Code Annotated section 9-10-108 (Repl. 2002), which provides for DNA testing of the putative father, mother, and child, or if necessary, other paternal and maternal relatives, in paternity actions, states in subsection (a)(6) that, if the test results establish a ninety-five percent or more probability of inclusion that the putative father is the biological father, it shall constitute a prima facie case of paternity.

Appellant argues that the DNA test results are not clear and convincing evidence that Earl was not her father but only proved that she and John had one common biological parent and that whether it was Earl or Mable was unknown. We disagree. When the DNA test results are viewed in conjunction with the other evidence, along with the lack of dispute that Mable was the mother of both John and appellant or that Earl was John's father, we believe that the presumption of Earl's paternity of appellant was rebutted by clear and convincing evidence. When the burden of proving a disputed fact is by clear and convincing evidence, the question on appeal is whether the trial court's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous. *Long v. Ark. Dep't of Human Servs.*, ___ Ark. App. ___, ___ S.W.3d ___ (June 28, 2006). As the trial court thoroughly discussed

in the order, appellant did not live with the Lantrips until she was around ten years old; according to her daughter, she lived with Clarence and Vera Garrison until she was about six. Appellant was listed as Clarence's daughter and as Scott Garrison's sister in their obituaries. The birth certificate issued for appellant's daughter, Peggy Keahey, who was born on October 18, 1950, listed appellant's age at that time as nineteen years, which would have meant that she had a 1931 birth date. In light of these facts, the trial court's finding of fact that appellant was not Earl's biological daughter was not clearly erroneous.

Appellant's second argument on this point—that Earl's affidavit in support of her delayed birth certificate constituted a legally conclusive finding of his paternity of her—is not persuasive. Act 1091 of 1995, codified at Ark. Code Ann. § 9-10-120 (Repl. 2002), provides in part:

> (a) A man is the father of a child for all intents and purposes if he and the mother execute an acknowledgment of paternity of the child pursuant to § 20-18-408 or § 20-18-409, or a similar acknowledgment executed during the child's minority.
>
> (b)(1) Acknowledgments of paternity shall by operation of law constitute a conclusive finding of paternity, subject to the modification of orders or judgments under § 9-10-115, and shall be recognized by the chancery courts and juvenile divisions thereof as creating a parent and child relationship between father and child.

In *Bean v. Office of Child Support Enforcement*, 340 Ark. 286, 9 S.W.3d 520 (2000), the supreme court noted that a "similar acknowledgment" could suffice to conclusively establish paternity of a child under Ark. Code Ann. § 9-10-120 if it was executed during the child's minority; it also held that the statute could not be retroactively applied. Here, Earl gave an affidavit to support appellant's application for a delayed birth certificate in 1980, long after

appellant had reached the age of majority; thus, this statute, which was enacted years later and is not applied retroactively, does not apply here.

Affirmed.

NEAL, J., agrees.

HART, J., concurs.